IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 134 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KAILASH BHARGAV

Versus

STATE OF GUJARAT

Appearance:

MR GM JOSHI for Petitioner

Mr S P Dave, APP for Respondent No. 1

Served for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 02/05/2001

C A V JUDGEMENT

The present Revision Application under Section 397 of the Code of Criminal Procedure, 1973 (for short, 'the Code') has been filed by the petitioner above named being the original accused in criminal Case No.5010/94

before the Court of the learned Chief Judicial Magistrate First Class at Mehasna for offence punishable under Section 138 of the Negotiable Instruments Act, 1881. (for short, 'the Act') The facts may be briefly stated as follows:

2. The aforesaid petitioner was prosecuted before the aforesaid Court in the aforesaid criminal case against him at the instance of the second respondent for an offence punishable under Section 138 of the Act. On completion of the trial, the learned Chief Magistrate passed an order on 10.12.1998 convicting the present petitioner for the aforesaid offence and sentencing him to suffer S.I. for six months. The petitioner was further directed to pay a fine of Rs. 15 lakhs amd in default, he was directed to suffer S.I. for three months. The trial court further directed that out of the amount of fine as aforesaid, Rs.7,57,834.86 be paid to the complainant by way of compensation. The petitioner was not satisfied with the said judgment and conviction order of the learned Magistrate and, therefore, he preferred Criminal Appeal No.62/98 before the Sessions Court at Mehsana. The learned Addl.Sessions Judge, who heard the said appeal of the present petitioner, dismissed the said appeal of the petitioner and confirmed the judgment and order passed by the learned Chief Magistrate, on 13.1.1999.

3. Feeling aggrieved by the said judgment and order of the learned Sessions Judge, the petitioner has preferred this Revision Application before this Court under Section 397 of the Code. It has been mainly contended here that the notice required to be issued under the said Act has been issued but the said notice is not legal and valid and, therefore, there could not be any prosecution of the present petitioner in absence of a legal and valid notice. Another contention raised by the petitioner is that the original complainant could not have filed the said complaint as the cheque was issued by the present petitioner in favour of one Vimal Paints and, therefore, the complaint filed by the second respondent is not legally maintainable. In that view of the matter, the petitioner has claimed that the judgment and order passed by the learned Chief Magistrate and confirmed by the learned Addl.Sessions Judge are illegal and erroneous and deserves to be set aside. The petitioner, therefore, prays that the present Revision Application be allowed, the judgment and conviction orders recorded by the two courts below be set aside and the petitioner be ordered to be acquitted outright.

4. On receipt of the Revision Application, notice was issued at the first instance and it appears that Rule was issued thereafter. In response to the service of Rule, Mr S P Dave, learned APP appeared on behalf of the State of Gujarat-respondent no.1. None appeared on behalf of contesting respondent no.2. I have heard the arguments advanced by the learned Advocates for the parties and have perused the papers.

5. Mr G M Joshi, learned Advocate appearing on behalf of the petitioner has argued at length that though the cheque in question was issued in the name of Vimal Paints, the complaint has not been filed by the said Vimal Paints, but it has been filed by respondent no.2. Therefore, the complaint which has been filed by the present respondent no.2 was not maintainable, as he was not a payee or a holder in due course, and therefore, the complaint filed by the second respondent was not tenable at all. Therefore, as submitted by Mr Joshi, the conviction against the present petitioner is required to be set aside on the said solitary ground.

5. R & P were called for and, therefore, I had an occasion to look into the original complaint before the learned Chief Judicial Magistrate First Class, at Mehsana which describes the complainant as follows:

"Mr Ghanshyambhai Mafatbhai Patel, Partner,
Vimal Paints, Mehsana"

6. It means that the second respondent has not filed the complaint before the trial court in his personal capacity but he has described himself as a partner of Vimal Paints. Therefore, ex-facie, it cannot be said that the complaint as filed by respondent no.2 was not maintainable since he was neither a payee not a holder in due course. Even in para 1 of the complaint before the trial court, it was mentioned by the second respondent that the complainant is the manufacturer of paints and doing business in the name of Vimal Paints. This further shows that the second respondent had filed the said complaint in his capacity as partner of Vimal Paints. This further shows that the complaint was not filed by the second respondent in his personal capacity. The learned Chief Magistrate had examined the second respondent before issuing process against the present petitioner. There the second respondent has stated on oath before the learned Magistrate below the said complaint that he has been running a factory in the name of Vimal Paints. This again shows that the complaint was filed by the second respondent as the partner of the said

Vimal Paints and not in his personal capacity. Then we can refer to the Vakilpatra filed by the second respondent as complainant before the trial court and even in the Vakilpatra, the name of the complainant has been shown as Ghanshyambhai M Patel as being and as partner of Vimal Paints. In the aforesaid view of the matter, it is amply clear that the second respondent had filed the said complaint before the learned Judicial Magistrate in the capacity as partner of the said firm and not in his personal capacity. In that view of the matter, he was the payee and the cheque was actually issued in favour of the firm in which he was a partner. Under the facts and circumstances and looking to the aforesaid evidence on record, I am of the view that the complaint as filed by the second respondent was maintainable and, therefore, this objection raised by the learned Advocate for the petitioner for the first time in this Court is not tenable.

7. Another objection raised in this Revision is that the cheque in question was issued on 7.10.1994 by the petitioner in favour of Vimal Paints. That the number of cheque was 1121604. But the cheque has been referred as Cheque no.1121664 in the complaint as well as in the notice dated 14.11.1994. Therefore, the notice was not issued with respect to the correct number of the cheque and, therefore, the complaint was not tenable and the present petitioner could not be convicted for the aforesaid offence. On going through the record, it is found that the learned Chief Magistrate has dealt with this aspect of the case during the course of his judgment. The learned Magistrate has found that in view of the numbers stated on the cheque in question, it was possible to read the same as 1121664 instead of 1121604. For this purpose, I had also an occasion to have a look at the cheque in question and it reveals that the learned Chief Magistrate was right in observing as aforesaid. With respect to the figure '6' in the cheque, on looking at the cheque, it appears that it was probable and possible to read it in the manner it was done by the second respondent. Rest of the description is without any mistake. The signature of the petitioner on the cheque has been proved at the trial. The cheque has been proved duly by the second respondent no.2. There is no dispute with respect to issuance of this cheque. There is no dispute about the name of the payee. There is no dispute about the date of the cheque and there is no dispute about the amount stated in the cheque. It is undisputed that the cheque produced before the trial court at Exh.28 was in fact presented by the second respondent for encashment and it was dishonoured by the

bank concerned. In other words, this cheque Exh.28 was really the disputed cheque and there is not dispute about the same and, therefore, simply because there was some clerical error on the part of the second respondent in mentioning the number of the cheque and when the mistake has been noticed only when it was brought to the notice for the first time during the course of the trial, then in that case, I am of the opinion that when the parties have understood that this was the cheque in dispute, it could not be said that this mistake which can be treated to be clerical mistake on the part of the second respondent in reading the correct number of the disputed cheque. In view of the aforesaid position, it cannot be said that this clerical error on the part of the second respondent goes to the root of the case of the second respondent which is fatal to his case.

8. A decision has been relied upon by the learned Advocate for the petitioner in the case of Dipendra G Choksi v. Kailashchandra C Dhoot (1995 (1) GLR 424). There it has been laid down by this Court that respondent to give details as to the cheque issued. There is no dispute about the same. At the same time, in the present case, it is found that there is clerical error on the part of the second respondent in mentioning the correct number of the cheque and that was because of the number disclosed on the cheque itself. Therefore, this cannot be treated to be an error fatal to the case of the second respondent. It seems that the complaint has actually been filed by the second respondent as the partner of the said firm and, therefore, it could not be said that the complaint filed by the second respondent is not maintainable.

9. In 1995 (1) GLR 423 (supra), this Court has stated that the court can take cognizance only if the complaint is filed in writing by the payee or the holder in due course of the cheque. As stated above, the present second respondent is found to be the payee. He is shown to be a partner of Vimal Paints and the description is found accordingly in the complaint as well as in the examination on oath below the complaint. Therefore, when the complaint has been filed by the second respondent as the payee, the requirement stated in the aforesaid decision has been complied with substantially and, therefore, the said decision cannot come to the rescue of the present petitioner.

10. Another decision referred to by the petitioner is in the case of Porbandar Commercial Cooperative Bank Ltd. v. Bhanji Lavji & Ors. (1985(1) GLR 49. This decision

shows that once it is found on evidence that the concerned partners have signed the surety bond taken by the remaining partners, there is no reason that appropriate award cannot be passed against the signatories of the surety bond in their capacity as sureties. It is held that even though other partners of the concerned firm may not be found responsible as such, the respective partners who had signed surety bond would remain personally liable to answer the suit as sureties. However, this decision is based on the acts of that case.

We do not find similar facts in the present case and, therefore, the said decision will not apply to the facts of the present case. No other point has been advanced by the petitioner.

11. It is thus clear that the revision petitioner is unable to point out any illegality committed by the two lower courts in arriving at a finding holding the petitioner guilty of offence punishable under section 138 of the Act. There is no reason to differ from the view taken by the said two courts. The power and jurisdiction of this court as a Court hearing acquittal revision are very limited and even if two views are possible, this court cannot substitute its own view for the view expressed by the two Courts below particularly when two courts below have recorded concurrent findings of fact and when the petitioner has failed to show that some prejudice has been caused to him on account of the said findings of the said two courts.

In view of the aforesaid, I find no merits in this Revision and therefore, it deserves to be dismissed. This petition is dismissed. Rule discharged.

Date:2.5.2001 [D P Buch, J.]
msp